

Winter 1992

Fourth Amendment--Protection against Unreasonable Seizures of the Person: The Intrusiveness of Dragnet Styled Drug Sweeps

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Recommended Citation

Shawn V. Lewis, Fourth Amendment--Protection against Unreasonable Seizures of the Person: The Intrusiveness of Dragnet Styled Drug Sweeps, 82 J. Crim. L. & Criminology 797 (1991-1992)

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FOURTH AMENDMENT—PROTECTION AGAINST UNREASONABLE SEIZURES OF THE PERSON: THE INTRUSIVENESS OF DRAGNET STYLED DRUG SWEEPS

Florida v. Bostick, 111 S. Ct. 2382 (1991)

I. INTRODUCTION

In *Florida v. Bostick*,¹ the United States Supreme Court held that the Fourth Amendment does not *per se* prohibit law-enforcement officers from conducting random sweeps of intrastate or interstate buses in search of drugs. In making its decision, the Court adopted a variation of its earlier “free to leave” test, which permits an officer to question a person without reasonable suspicion as long as a reasonable person would feel free to walk away.² The Court here found that the proper test for police encounters aboard buses is “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”³

This Note traces the origins of the “free to leave” test and the subsequent case law. This Note argues that the Court continues to rely on a test that is difficult to apply and leaves too much discretion to the courts. This Note also maintains that the Court has failed to provide proper guidance to law enforcement officials as to the conduct required to prevent consensual encounters with individuals from becoming unreasonable or unlawful seizures. Furthermore, this Note discusses the possible social consequences of the Court’s decision. Finally, this Note suggests that a more appropriate test for bus encounters is one that considers the objective intent of the officers.

II. BACKGROUND

In an effort to combat drug trafficking between “source” cities in this country, law-enforcement officials have engaged in dragnet

¹ 111 S. Ct. 2382 (1991).

² *Id.* at 2386-87.

³ *Id.* at 2387.

styled sweeps of intrastate and interstate buses.⁴ In a typical dragnet sweep, the officers randomly board buses at stopovers and then without any suspicion select passengers for questioning.⁵ After identifying themselves as police officers, the officers check the passenger's identification against his or her ticket.⁶ Regardless of the results of this check, the officers proceed to ask for consent to search the passenger's luggage for drugs.⁷ This type of police-citizen encounter raises a Fourth Amendment concern over whether such an encounter is an unreasonable (or unlawful) seizure of the person.⁸

A. FOURTH AMENDMENT JURISPRUDENCE AND THE *TERRY* DOCTRINE

1. *Fourth Amendment Protection*

The Fourth Amendment to the United States Constitution protects individuals from unwarranted intrusions into their personal privacy and security:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁹

The strongest protection against searches and seizures is found in the Warrant Clause of the Amendment. Before a law-enforcement officer can conduct a search or seizure, he or she must follow the warrant procedure which requires the officer to show probable cause and to obtain a specific warrant from a magistrate.¹⁰ However, as the Court noted in *Terry v. Ohio*,¹¹ obtaining a warrant in advance is only necessary when practical,¹² and can be "excused by exigent circumstances."¹³ The *Terry* Court further observed that historically

⁴ *Id.* at 2389-90 (Marshall, J., dissenting).

⁵ *Id.* (Marshall, J., dissenting).

⁶ *Id.* at 2390 (Marshall, J., dissenting).

⁷ *Id.* (Marshall, J., dissenting).

⁸ If an unreasonable seizure occurs prior to a person's consent to search, any evidence obtained during the unlawful search is inadmissible at trial, unless there is an intervening event that breaks the connection between the officer's illegal conduct and the person's consent. *Florida v. Royer*, 460 U.S. 491, 501 (1983); *Dunaway v. New York*, 442 U.S. 200, 218-19 (1979).

⁹ U.S. CONST. amend. IV.

¹⁰ See *Katz v. United States*, 389 U.S. 347, 356-57 (1967); *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

¹¹ 392 U.S. 1 (1968).

¹² See, e.g., *Katz*, 389 U.S. at 357-59; *Chapman v. United States*, 365 U.S. 610, 615 (1961).

¹³ See, e.g., *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

and as a practical matter, officers on patrol have not been subjected to the warrant procedure when immediate action is required to investigate possible criminal activity.¹⁴ Instead, the officers' conduct must be judged "by the Fourth Amendment's general proscription against unreasonable searches and seizures."¹⁵ Prior to *Terry*, any seizure of the person was "unreasonable" pursuant to the Fourth Amendment, unless the seizure was justified by probable cause to arrest for a crime.¹⁶ There is probable cause when an objective and cautious interpretation of reasonably trustworthy information obtained by the officer warrants one to believe that a crime has been or is being committed by the person to be arrested.¹⁷

2. *The Terry Doctrine*

Providing an exception to the general rule requiring probable cause, the *Terry* Court articulated a two prong balancing test to determine the reasonableness of a search and seizure.¹⁸ First, a police officer's actions must be justified at its inception,¹⁹ i.e., the government's interests must on balance warrant the particular intrusion upon a person's privacy. Second, the scope of the search and seizure must be reasonable under the circumstances.²⁰

The Court in *Terry* held that a police officer, who has reasonable suspicion that "criminal activity was afoot," can seize a suspect and conduct a limited search to determine if the suspect is armed, in order to protect himself and others nearby.²¹ The Court limited its holding to cases where a police officer stops and frisks a suspect for weapons.²² But in subsequent decisions the Court expanded its

¹⁴ *Terry*, 392 U.S. at 20.

¹⁵ *Id.*

¹⁶ *Dunaway v. New York*, 442 U.S. 200, 208 (1979).

¹⁷ *Id.* at 208 n.9 (1979).

¹⁸ *Terry*, 392 U.S. at 20.

¹⁹ *Id.*

²⁰ *Id.* The Court explained that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.

²¹ *Id.* at 30. In *Terry*, a police officer, who was walking a beat, noticed three men, including Terry, acting as if they were planning to rob a store. *Id.* at 6. The officer approached the men, and identified himself as a police officer before asking for their names. *Id.* at 6-7. When the men "mumbled something" in response to his inquiries, the officer grabbed Terry, patted down the outside of his clothing, and found a gun in the breast pocket of Terry's overcoat. *Id.* at 7.

The Court noted that "[t]he sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29.

²² *Id.* at 15.

holding to include temporary seizures for the sole purpose of questioning when an officer has "reasonable suspicion" that illegal activity is involved, and the officer has limited his conduct to the purpose of the stop.²³ For example, an officer can legally stop a vehicle, near the border, for limited questioning to dispel reasonable suspicion that immigration laws are being violated, but without additional articulable facts or consent, the officer cannot legally conduct a search of that vehicle or detained them for some other reason.²⁴

The Court in *Terry*, however, failed to articulate a standard for determining when a seizure occurs. Since the seizure of *Terry* was obvious given that the officer grabbed and searched him²⁵ and because the record was unclear as to the antecedent events, the Court declined to rule on whether a seizure had occurred prior to that point.²⁶ However, in dicta the Court suggested that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."²⁷

Additional support for this proposition is found in the *Terry* concurrences. "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets."²⁸ "Any person, including a policeman, is at liberty . . . to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away."²⁹

B. DETERMINING WHEN A SEIZURE OCCURS: THE *MENDENHALL-ROYER* "FREE TO LEAVE" TEST

1. *The "Free to Leave Test"*

Not until twelve years after *Terry* did the Court announce a general rule for determining when a seizure of the person occurs. In

²³ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975).

²⁴ *Id.*

²⁵ *Terry*, 392 U.S. at 19. The Court stated that "[i]n this case there can be no question . . . that [the police officer] 'seized' [Terry] and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing." *Id.*

²⁶ *Id.* at 19 n.16. The Court explained:

We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching *Terry* for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

Id.

²⁷ *Id.* at 19 n.16.

²⁸ *Id.* at 33 (White, J., concurring).

²⁹ *Id.* at 32-33 (Harlan, J., concurring) (emphasis added).

United States v. Mendenhall,³⁰ Justice Stewart, writing for a two person plurality in which only Justice Rehnquist joined, held that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."³¹ Prior to Justice Stewart's pronouncement of the "free to leave" test, the Court had no occasion to hold, except in vehicle stop cases,³² that a seizure of person occurred solely because of an

³⁰ 446 U.S. 544 (1980).

³¹ *Id.* at 554 (opinion of Stewart, J.). In *Mendenhall*, two DEA agents using a drug profile selected Mendenhall for questioning, after she had arrived at the Detroit Metropolitan Airport on a plane from Los Angeles, and was walking down the airport concourse. *Id.* at 547. The agents identified themselves, and at their request Mendenhall produced her driver's license and airline ticket. *Id.* at 548. The name on the license and ticket did not match, and Mendenhall became noticeably nervous when the agents made further inquiries. *Id.* at 549. The agents returned the ticket and license to Mendenhall before asking and receiving consent to conduct further questioning in the airport DEA office. *Id.* At the office, Mendenhall consented to a search of her purse, and then later consented to a search of her person by a female police officer in a private room. *Id.* As Mendenhall disrobed she took two packets of heroin from her undergarments. *Id.*

Justice Powell concurred in the decision, but since neither of the courts below considered the question of seizure, Justice Powell declined to join Justice Stewart's conclusion that no seizure had occurred. *Id.* at 560 (Powell, J., concurring in part and concurring in judgment). Instead, Justice Powell assumed a seizure had occurred and argued that, under *Terry*, the seizure was justified, because the officers had reasonable suspicion that Mendenhall had engaged in criminal activity. *Id.* (Powell, J., concurring in part and concurring in judgment) (Justice Powell noted in a footnote that the question of whether a seizure occurred was an extremely close one).

On the other hand, the dissent found that Mendenhall had been seized because, under *Terry*, any stop by law enforcement implicates Fourth Amendment rights, but the reasonableness of the intrusion is to be weighed by considering all the circumstances of the encounter, and that the seizure was unjustified because the dissent did not feel that the officers had satisfied the reasonable suspicion required to stop someone suspected of criminal activity. *Id.* at 567, 573 (White, J., dissenting).

³² Vehicle stops are instances where the police pull a vehicle over for a traffic violation or for some other reason. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), Justice Marshall explained why vehicle stops have been categorically recognized as seizure of the person:

It must be acknowledged at the outset that a traffic stop significantly curtails the "freedom of action" of the driver and the passengers, if any, of the detained vehicle. Under the law of most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission. *E.g.*, OHIO REV. CODE ANN. 4511.02 (1982). Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so. Partly for these reasons, we have long acknowledged that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief."

Id. at 436-37 (footnotes omitted); see also *Colorado v. Bannister*, 449 U.S. 1, 4 n.3 (1980) (the Court stated that "[t]here can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment.").

officer's "show of authority," rather than physical force or contact.³³

In delineating when a police encounter becomes within the purview of the Fourth Amendment, Justice Stewart relied on dicta and concurrences in *Terry*, that suggested as an alternative to physical contact, a "show of authority" that caused an individual to involuntarily submit to the officer's request would constitute a seizure.³⁴ Specifically, Justice Stewart stated "that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained."³⁵ Some examples of circumstances that might constitute a seizure of the person, even though the individual did not attempt to walk away are: (1) the threatening presence of several officers, (2) the display of a weapon by an officer, (3) the physical touching of the person of the citizen, or (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled.³⁶

Justice Stewart rejected a rule that would characterize all street encounters as seizures.³⁷ He reasoned that such a rule "would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices."³⁸ Hence the policy underlying Justice Stewart's rule is that police officers need the flexibility to question people during a criminal investigation without having to justify the encounter under the *Terry* balancing test.³⁹ Otherwise, "those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished."⁴⁰

Three years later, in *Florida v. Royer*,⁴¹ a majority of the Court adopted Justice Stewart's "free to leave" test. Justice White, writing for the plurality,⁴² ruled that a law enforcement officer's simple

³³ See *Sibron v. New York*, 392 U.S. 40 (1968) (where unclear facts prevented the Court from ruling on whether a seizure occurred prior to the actual physical seizure required to perform the search); *Peters v. New York*, 392 U.S. 40 (1968) (the Court found that a police officer had abruptly seized a fleeing suspect when he grabbed him by the collar). See also, *Adams v. Williams*, 407 U.S. 143 (1972) (officer asked suspect seated in park car to open door but the suspect rolled down the window instead, so the officer immediately searched for a gun); *Brown v. Texas*, 443 U.S. 47 (1979) (officers asked man in alley for identification and when the man refused to identify himself the officers frisked him but found nothing).

³⁴ *Mendenhall*, 446 U.S. at 552-53 (opinion of Stewart, J.).

³⁵ *Id.* at 553 (opinion of Stewart, J.).

³⁶ *Id.* at 554 (opinion of Stewart, J.).

³⁷ *Id.* (opinion of Stewart, J.).

³⁸ *Id.* (opinion of Stewart, J.).

³⁹ *Id.* (opinion of Stewart, J.).

⁴⁰ *Id.* (opinion of Stewart, J.).

⁴¹ 460 U.S. 491 (1983) (plurality opinion).

⁴² Justice White was joined by Justices Marshall, Powell and Stevens.

questioning of an individual was only a consensual encounter and did not amount to seizure.⁴³ The Court explained:

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, *without more*, convert the encounter into a seizure requiring some level of objective justification.⁴⁴

Nevertheless, the plurality found that a seizure occurs when law enforcement officials approach an individual, identify themselves as narcotic agents, tell the individual he is a suspect, retain the individual's identification and fail to advise the individual that he is free to depart.⁴⁵ The plurality reasoned that such circumstances "amount[ed] to a show of official authority such that a 'reasonable person would have believed that he was not free to leave.'" ⁴⁶

⁴³ *Royer*, 460 U.S. at 501. In *Royer*, two plain clothes detectives from the Dade County, Fla. Sheriff's Department, using a drug courier profile, selected Royer for questioning, after he had purchased a one-way airline ticket from Miami to New York City. *Id.* at 493. On the concourse, the detectives first identified themselves as policemen and then asked Royer for his drivers license and airline ticket. *Id.* at 493-94. The name used on Royer's airline ticket and baggage identification did not match his driver license, and the officers retained the ticket and license. *Id.* at 494. Royer became noticeably nervous during subsequent questioning, and thus the detectives chose to identify themselves as narcotics officers and told Royer that they suspected him of transporting narcotics. *Id.* When the detectives asked Royer to accompany them to a room, which was described as a large storage closet with a desk and two chairs, they still had not returned Royer's identification and ticket. *Id.* After retrieving Royer's luggage without Royer's consent, the detectives asked for his consent to search the luggage. Using a key given to them by Royer, the detectives opened the luggage and found marijuana. *Id.*

The plurality concluded that simply asking to see Royer's driver's license and ticket did not amount to seizure. *Id.* at 501 (plurality opinion).

⁴⁴ *Id.* at 497 (plurality opinion) (cites omitted) (emphasis added).

⁴⁵ *Id.* at 501 (plurality opinion).

⁴⁶ *Id.* at 502 (plurality opinion). The plurality also found that the seizure was lawful up until the officers escorted Royer to the investigation room, since the officers had reasonable suspicion from observations made of Royer's conduct and the officers discovery that Royer was traveling under an assumed name. *Id.* (plurality opinion). However, once Royer was placed in the police room, reasonable suspicion was no longer enough to detain Royer further given the circumstances (never told him he was free to leave, still had license and ticket, already had seized luggage, purpose of going to room was to search luggage but never asked Royer before retrieving it, the room was small and confining). *Id.* at 502-08 (plurality opinion). The plurality concluded that Royer was effectively under arrest; therefore, probable cause and not reasonable suspicion was required. *Id.* (plurality opinion).

Justice Brennan, in a separate concurrence, agreed that Royer had been seized, but found that the actual seizure occurred at the time the officers identified themselves and asked him for his driver's license and airline ticket. *Id.* at 511 (Brennan, J., concurring in the result). Justice Powell agreed with the plurality that an unlawful seizure occurred, but also differed as to when the seizure occurred. *Id.* at 508-09 (Powell, J., concurring).

2. Application of the "Free to Leave" Standard

Since *Mendenhall* and *Royer*, the Court has repeatedly found that the questioning by an officer of an individual does not require Fourth Amendment scrutiny as long as the officer does not make a "show of authority." Writing for the majority in *I.N.S. v. Delgado*,⁴⁷ Justice Rehnquist further explained that in a consensual encounter, an individual has the right to refuse to answer questions, but the lack of knowledge of this right does not convert the encounter into a seizure:

While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the persons refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.⁴⁸

A case in point is *Florida v. Rodriguez*.⁴⁹ The Court held that the initial contact between three plain clothes officers and Rodriguez in the Miami Airport terminal was a consensual encounter and not a seizure.⁵⁰ On the airport terminal's concourse, the officers had asked Rodriguez if he would step aside and talk with them.⁵¹

In applying the "free to leave" test, the Court in *Delgado* declared that the test is not applicable to certain circumstances. The

Justice Powell distinguished this case from *Mendenhall*, emphasizing the size and condition of the room that Royer was taken to, and the fact that Royer's license was retained and that Royer's luggage had already been obtained. *Id.* at 508 (Powell, J., concurring). Justice Powell, however, indicated that in both Royer's case and *Mendenhall* the initial questioning and the request to accompany the officers to a more private place was lawful. *Id.* (Powell, J., concurring).

In dissent, Justice Blackmun found that since the officers had sufficient suspicion to initially detain Royer, under *Terry*, Royer's consent to accompany the officers to the room and his consent to the search of his luggage was voluntary. *Id.* at 516-19 (Blackmun, J., dissenting). Justice Blackmun reasoned that the plurality had erred by not balancing the nature and the degree of the intrusion against the government's interest in having more flexibility and the facts supporting the detention. *Id.* at 518 (Blackmun, J., dissenting).

Justice Rehnquist also dissented and was joined by Chief Justice Burger and Justice O'Connor. Justice Rehnquist found that the officers had not acted unreasonably during or after the initial conversation with Royer on the concourse. *Id.* at 526 (Rehnquist, J., dissenting).

⁴⁷ 466 U.S. 210 (1984).

⁴⁸ *Id.* at 216-17 (cites omitted).

⁴⁹ 469 U.S. 1 (1984).

⁵⁰ *Id.* at 4-6.

⁵¹ *Id.* at 4.

majority held that an entire factory is not seized when law enforcement officials are posted at the factory exits during the questioning of the workers by other officers.⁵² Justice Rehnquist reasoned that the workers' freedom to leave or to move about the factory had already been voluntarily and significantly restricted in view of their obligation to their employer to work.⁵³

More recently, the Court has used the test to determine when investigatory pursuit or surveillance becomes a seizure. In *Michigan*

⁵² *Delgado*, 466 U.S. at 219.

⁵³ *Id.* at 218. In *Delgado*, Immigration and Naturalization Service (INS) agents conducted three different surveys of a factory to determine which employees were illegal aliens. *Id.* at 212. The first two surveys were conducted pursuant to search warrants and the last survey was conducted with the employer's consent. *Id.* During the surveys, INS agents were positioned at all the factory's exits while other agents questioned employees at their work stations or in other areas of the factory. *Id.* The agents were armed, displayed badges and carried walkie-talkies. *Id.* After identifying themselves as immigration agents, the agents asked the employees questions regarding their citizenship. *Id.* Only when an employee responded unsatisfactorily or admitted that he was not a United States citizen did the agents ask for immigration papers to determine whether he/she was an illegal alien. *Id.* at 212-13.

The majority held that the INS's tactics did not represent a seizure of the entire factory. *Id.* at 219. In addition, the majority held that the individual questioning of the respondents by the agents was only a mere consensual encounter that did not invite Fourth Amendment questions. *Id.* at 221. However, the majority also suggested that the questioning of individuals other than the respondent may have been a seizure within the Fourth Amendment. Said the Court: "While persons who attempted to flee or evade the agents may eventually have been detained for questioning, respondents did not do so and were not in fact detained." *Id.* at 220 (cites omitted).

In concurrence, Justice Powell stated that the question of the individual seizure was a close one, even if seizure was found to be reasonable. *Id.* at 221 (Powell, J., concurring). Justice Powell cited the reasoning in *United States v. Martinez-Fuerte*, 428 U.S. 543, 546, 556 (1976) (the court held that check point stops instituted to apprehend illegal aliens are seizures within the Fourth Amendment, but government interest in illegal alien control is great and the intrusion to the individual is minimal), to support his conclusion. *Delgado*, 466 U.S. at 221 (Powell, J., concurring).

Justice Brennan, joined by Justice Marshall, concurred in part and dissented in part. Justice Brennan disagreed with the majority and found that the respondents had been unreasonably seized when the INS agents questioned them individually. *Id.* at 225-26 (Brennan, J., concurring in part and dissenting in part). Justice Brennan said that the majority erred because it treated the questioning like it was only an isolated one-on-one encounter, instead of considering all of the surrounding circumstances. *Id.* at 229-30 (Brennan, J., concurring in part and dissenting in part). The survey was a surprise and created a significant disruption in the work environment. *Id.* at 230. (Brennan, J., concurring in part and dissenting in part). While agents guarded the exits, other agents flashed their badges and directed pointed questions at the workers. *Id.* (Brennan, J., concurring in part and dissenting in part). After the questioning, those workers who were suspected of being illegal aliens were handcuffed and taken to vans that were located outside the factory. *Id.* (Brennan, J., concurring in part and dissenting in part). Such circumstances certainly created a highly coercive environment in which no reasonable person would feel free to disregard the agents and walk away. *Id.* (Brennan, J., concurring in part and dissenting in part).

v. Chesternut,⁵⁴ a unanimous Court concluded that simply driving a police vehicle parallel to a running pedestrian was not "so intimidating" that a reasonable person would not feel "free to disregard the police presence and go about his business."⁵⁵ The Court rejected both the petitioner's and the respondent's arguments for a "bright line" rule approach.⁵⁶ Instead, the Court adhered to the contextual approach of the "free to leave" test, requiring the court to take into account "all the circumstances surrounding the incident" in each individual case.⁵⁷

The ["free to leave"] test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.⁵⁸

According to *Chesternut*, the "free to leave" test provides the courts with flexibility to judge a "whole range of police conduct in an equally broad range of settings."⁵⁹ Yet the Court further observed that the test "calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police."⁶⁰ The reasonable man in the test is an objective standard that serves two purposes.⁶¹ First, the standard "allows the police to determine in advance whether the

⁵⁴ 486 U.S. 567 (1988).

⁵⁵ *Id.* at 576. In *Chesternut*, the respondent started to run when he saw a patrol car approach. *Id.* at 569. The police accelerated to catch up with him, and as they drove along side of him, respondent discarded some pills. *Id.* The Court concluded that the respondent was not seized by the police before he discarded the pills. *Id.* at 574. The Court reasoned that "a police car driving parallel to a running pedestrian could be somewhat intimidating," but did not amount to seizure. The Court noted that the officers did not activate the siren, command the respondent to stop, display their weapons or block the respondents path. *Id.* at 575.

⁵⁶ *Id.* at 572. Regarding investigative pursuit, the Court rejected the petitioner's argument "that the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority." *Id.* In other words, the "lack of objective and particularized suspicion" should not prevent an officer from using coercive tactics, unless the officer "succeed[s] in actually apprehending the individual." *Id.*

The Court also rejected the respondent's converse argument "that any and all police 'chases' are Fourth Amendment seizures." *Id.* Thus, "the police may never pursue an individual absent a particularized and objective basis for suspecting that he is engaged in criminal activity." *Id.*

⁵⁷ *Id.* at 572-73.

⁵⁸ *Id.* at 573.

⁵⁹ *Id.* at 574.

⁶⁰ *Id.*

⁶¹ *Id.*

conduct contemplated will implicate the Fourth Amendment.”⁶² Second, the standard “ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.”⁶³

Two investigative pursuit cases since *Chesternut* have added more precision to the *Mendenhall-Royer* test. First, in *Brower v. County of Inyo*,⁶⁴ writing for the majority, Justice Scalia stated that “a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement . . . nor even whenever there is a governmentally caused and governmentally desired termination . . . but only when there is a governmental termination of freedom of movement through means intentionally applied.”⁶⁵ Second, in *California v. Hodari*,⁶⁶ Justice Scalia, again writing for the majority, found that an affirmative answer to the *Mendenhall-Royer* test is not dispositive, if the person fails to submit to the show of authority.⁶⁷

In sum, in order to justify the arrest of an individual, under the Fourth Amendment, a police officer must have probable cause that the individual committed a crime. For those situations that fall short of an arrest but amount to a detention within the Fourth Amendment, the *Terry* doctrine requires: (1) the police officer to have reasonable suspicion that the individual is or was involved in criminal activity, and (2) the scope of the search and seizure to be reasonable under the circumstances. Finally, absent probable cause or reasonable suspicion, under *Mendenhall-Royer*, an encounter between a police officer and an individual is not a seizure, as long as the individual feels free to break off the encounter and walk away. Hence no Fourth Amendment scrutiny is required.

III. SUMMARY OF FACTS

Broward County, Florida has a drug interdiction program designed to stop drug trafficking via buses, trains, or airplanes.⁶⁸ For buses, the program requires officers from the County Sheriff’s Department to routinely board intrastate or interstate buses at scheduled stopovers to randomly, or with a minimal suspicion of criminal activity, ask individuals for permission to search their

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 489 U.S. 593 (1989).

⁶⁵ *Id.* at 596-97.

⁶⁶ 111 S. Ct. 1547 (1991).

⁶⁷ *Id.* at 1550-51.

⁶⁸ *Florida v. Bostick*, 111 S. Ct. 2382, 2384 (1991).

luggage.⁶⁹

On the morning of August 27, 1985, two officers from the Broward County Sheriff's Department boarded a Greyhound Bus bound from Miami to Atlanta while it was temporarily stopped at the Fort Lauderdale terminal.⁷⁰ The plainclothes officers wore jackets with insignia identifying them as law enforcement officials, and one held "a recognizable zipper pouch, containing a pistol . . ."⁷¹ Upon boarding, the officers had no articulable suspicion that any passenger was engaging in drug trafficking.⁷² Nevertheless, the officers randomly selected Terrance Bostick for questioning.⁷³ The officers asked to see Bostick's identification and bus ticket.⁷⁴ The information on the identification and ticket matched, and the officers returned them to Bostick without comment.⁷⁵ After identifying themselves as narcotics agents, the officers further inquired whether he would consent to having his luggage searched for drugs.⁷⁶ According to the officers, Bostick consented to their search request.⁷⁷ In the course of their search, the officers found cocaine in the second bag that they searched.⁷⁸ Bostick was arrested and charged with trafficking in cocaine.⁷⁹ Bostick thereafter moved to suppress the cocaine on the grounds that it had been seized in violation of his Fourth Amendment rights.⁸⁰

⁶⁹ *Id.*

⁷⁰ *Id.* Brief of Respondent at 1, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717) [hereinafter Brief of Respondent]; Petitioner's Brief on the Merits at 1, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717) [hereinafter Petitioner's Brief].

⁷¹ *Bostick*, 111 S. Ct. at 2384; Brief of Respondent, *supra* note 70, at 1; Petitioner's Brief, *supra* note 70, at 1.

⁷² *Bostick*, 111 S. Ct. at 2384-85.

⁷³ *Id.* at 2385.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* There was some dispute as to whether Bostick consented to the search of the second bag, but the Court followed the Florida Supreme Court ruling that "any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge." *Id.* It should be noted that the trial court's order denying motion to suppress, August 4, 1986, stated no finding of fact. See Joint Appendix at JA-2, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717). At the suppression hearing, Bostick testified that the officers only asked for consent to search the first bag, which was red. *Id.* at JA-3, JA-43-45. On the other hand, both officers testified that after the search of the red bag was completed, Bostick was asked to consent to the search of the second bag, which was blue. *Id.* at JA-10, JA-23.

⁷⁸ *Bostick*, 111 S. Ct. at 2385.

⁷⁹ *Id.*

⁸⁰ *Id.*

IV. PROCEDURAL BACKGROUND

The trial court denied Bostick's motion to suppress the cocaine.⁸¹ On appeal, the Florida Appellate Court affirmed the trial court's ruling but certified the following question to the Florida Supreme Court: "May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?"⁸² Before answering the certified question, the Florida Supreme Court amended it to read: "Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage?"⁸³ The court answered the certified question in the affirmative⁸⁴ and found that, under the circumstances, Bostick was unreasonably "seized", within the meaning of the Fourth Amendment of the United States Constitution, when the officers approached him on the bus.⁸⁵ The court based its finding that Bostick had been unreasonably seized on three factors. First, a reasonable person would not have felt "free to leave" or "free to disregard the questions and walk away" because both of the officers wore raid jackets, one of them appeared to be holding a weapon and the other partially blocked the bus aisle during questioning.⁸⁶ Second, the bus was about to depart soon, so Bostick could not leave, and "[h]e had only the confines of the bus itself in which to move about, had he felt the officers would let him do so."⁸⁷ Third, the state conceded that there was no articulable suspicion that Bostick was engaging in illegal activity.⁸⁸

The court further concluded that the consent was involuntary because there was no definitive break in the illegal environment already created by the seizure.⁸⁹ Thus, any consent Bostick gave to search his luggage was tainted by the unreasonable seizure and must be suppressed.⁹⁰

⁸¹ *Id.* Bostick pleaded guilty to the drug trafficking charge, "but reserved the right to appeal the denial of the motion to suppress." *Id.*

⁸² *Bostick v. State*, 510 So. 2d 321, 322 (Fla. Dist. Ct. App. 1987) (per curiam).

⁸³ *Bostick v. State*, 554 So. 2d 1153, 1154 (Fla. 1989).

⁸⁴ *Id.*

⁸⁵ *Id.* at 1157-59. See *supra* text accompanying note 9 for the language of the Fourth Amendment.

⁸⁶ *Bostick*, 554 So. 2d at 1157.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1158.

⁸⁹ *Id.*

⁹⁰ *Id.*

Finally, the court found that (under the circumstances) the government had "exceeded its power to interfere with the privacy of an individual citizen who is not even suspected of any criminal wrongdoing."⁹¹ The court reasoned that the Broward County policy interfered too greatly with individual privacy rights. The fight against drug trafficking could not justify such intrusions because that would only lead to an authoritarian state.⁹²

The court, therefore, quashed the opinion of the appellate court and remanded the case for further proceedings consistent with the supreme court's opinion.⁹³

The state of Florida petitioned for certiorari on the grounds that the Florida Supreme Court's decision conflicted with the controlling case law from the United States Supreme Court and also conflicted with federal courts of appeals decisions, e.g., the Court of Appeals for the Eleventh Circuit, as well as state courts of appeals decisions, e.g., the North Carolina Court of Appeals.⁹⁴ Certiorari was granted by the Court.⁹⁵

V. THE SUPREME COURT OPINION

A. MAJORITY OPINION

Writing for the majority,⁹⁶ Justice O'Connor, reversed the Florida Supreme Court's decision and remanded the case for further proceedings using the correct legal standard.⁹⁷ The majority held that "in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."⁹⁸ This test applies equally to police encounters on streets, in an airport lobby or on a bus.⁹⁹

Justice O'Connor characterized the Florida Supreme Court's decision as "a *per se* rule that the Broward County Sheriff's practice

⁹¹ *Id.*

⁹² *Id.* at 1158-59.

⁹³ *Id.* at 1159.

⁹⁴ Petition for Writ of Certiorari to the Florida Supreme Court at 10-12, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717).

⁹⁵ *Florida v. Bostick*, 111 S. Ct. 2382, 2385 (1991).

⁹⁶ Justice O'Connor was joined by Chief Justice Rehnquist, and Justices White, Scalia, Kennedy and Souter.

⁹⁷ *Bostick*, 111 S. Ct. at 2388-89.

⁹⁸ *Id.* at 2389.

⁹⁹ *Id.*

of 'working the buses' is unconstitutional,"¹⁰⁰ and concluded that the Florida Supreme Court erred because its decision was based on whether Bostick felt "free to leave" the bus, rather than on whether he felt free to "decline the officers' requests or otherwise terminate the encounter."¹⁰¹ Justice O'Connor determined that Bostick voluntarily boarded the bus and did not intend to leave, since the bus was about to depart. Thus, even if the officers had not approached him, Bostick would not have felt "free to leave."¹⁰²

Justice O'Connor stated that the controlling law in this case flows from Justice Warren's dicta in *Terry*¹⁰³ stating that, "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." "¹⁰⁴ Seizure does not occur when an individual is approached by a police officer, unless the individual does not "feel free 'to disregard the police and go about his business.'" "¹⁰⁵ A police officer is free to approach an individual and ask if he or she would be "willing to answer some questions."¹⁰⁶ Justice O'Connor noted that if the police had encountered Bostick on the street or in the bus terminal, the case law shows that there would be no seizure.¹⁰⁷ In other cases similar to Bostick's, the Court has said that it is not necessary that the police have reason to suspect the individual before they ask him or her questions, "as long as the police do not convey a message that compliance with their requests is required."¹⁰⁸

The majority argued that the "free to leave" test was an inappropriate measure for encounters that take place on a bus.¹⁰⁹

When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the

¹⁰⁰ *Id.* at 2385.

¹⁰¹ *Id.* at 2389.

¹⁰² *Id.* at 2387.

¹⁰³ See *supra* text accompanying notes 18-29 for a discussion of *Terry*.

¹⁰⁴ *Bostick*, 111 S. Ct. at 2386 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

¹⁰⁵ *Id.* (quoting *California v. Hodari D.*, 111 S. Ct. 1547, 1551 (1991)).

¹⁰⁶ *Id.* (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion) (police encounter in an airport terminal)).

¹⁰⁷ *Id.* In support of this contention, Justice O'Connor cited to *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984) (police encounter in an airport terminal).

¹⁰⁸ *Id.* at 2386 (citing *INS v. Delgado*, 466 U.S. 210, 216 (1984) (INS agent encounter in a factory); *United States v. Mendenhall*, 466 U.S. 544, 557-58 (1980) (DEA agent encounter in an airport terminal)).

¹⁰⁹ *Id.*, at 2387.

person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.¹¹⁰

In other words, the police did not confine Bostick, rather he placed himself in confinement when he initially boarded the bus.¹¹¹

In support of its argument, the majority drew an analogy to *I.N.S. v. Delgado*.¹¹² In *Delgado*, the Court held that random visits to factories by INS agents to question workers about their citizenship did not constitute a seizure, even though INS agents were posted at the factory exits.¹¹³ The Court stated that the workers had an obligation to their employer to remain at work, so they were not free to leave regardless of the agents' presence.¹¹⁴ Thus, the *Bostick* majority declared that the true test in situations like Bostick's and the one in *Delgado* is whether, considering all of the circumstances, "a reasonable person would [have felt] free to decline the officers' requests or otherwise terminate the encounter."¹¹⁵ The majority reasoned that, "[l]ike the workers in [*Delgado*], Bostick's freedom of movement was restricted by a factor independent of police conduct—i.e., by his being a passenger on a bus."¹¹⁶ Additionally, the majority emphasized that refusals to cooperate with the officers would not be considered justification for the officers to detain or seize the individual.¹¹⁷

Upon announcing its decision, the majority declined to rule on whether Bostick felt free not to respond to the officers' inquiries because the "trial court made no express findings of fact," and in the majority's view, the Florida Supreme Court based its decision on the sole fact that the encounter took place on a bus, "rather than on the totality of the circumstances."¹¹⁸ But in dictum the majority suggested that a seizure probably had not occurred, since "the officers did not point guns at Bostick or otherwise threaten him and that they specifically advised Bostick that he could refuse consent."¹¹⁹ Accordingly, the Court remanded the case to the Florida courts for

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 466 U.S. 210 (1984). See *supra* note 53 and accompanying text for a more detailed discussion of *Delgado*.

¹¹³ *Delgado*, 466 U.S. at 221.

¹¹⁴ *Id.* at 218.

¹¹⁵ *Florida v. Bostick*, 111 S. Ct. 2382, 2387 (1991).

¹¹⁶ *Id.*

¹¹⁷ *Id.* The majority also noted that there is no merit to the argument that a reasonable person would not "freely consent to a search of luggage that he or she knows contains drugs." *Id.* at 2388.

¹¹⁸ *Id.* at 2388.

¹¹⁹ *Id.* at 2387-88.

further proceedings using the proper legal standard.¹²⁰

B. JUSTICE MARSHALL'S DISSENTING OPINION

In dissent, Justice Marshall, joined by Justices Blackmun and Stevens, disagreed with the majority's overall characterization of the Florida's Supreme Court's decision.¹²¹ Specifically, the dissent argued that the majority erred in concluding that the Florida Supreme Court announced a *per se* rule independent of the facts.¹²² The Florida Supreme Court "repeatedly emphasized that its conclusion was based on 'all the circumstances' of this case."¹²³ The dissent further declared that "the issue whether a seizure has occurred in any given factual setting is a question of law [and as such] nothing prevents this Court from deciding on its own whether a seizure occurred based on all of the facts of this case as they appear in the opinion of the Florida Supreme Court."¹²⁴

The majority and dissent agreed that the appropriate test in this case "is whether a passenger who is approached during such a sweep 'would feel free to decline the officers' requests or otherwise terminate the encounter.'" ¹²⁵ Unlike the majority, however, the dissent concluded that based on the facts, the police officer's conduct towards Bostick was coercive and constituted an "intimidating show of authority," resulting in Bostick not feeling free to terminate the encounter.¹²⁶ After highlighting the fact that the officers never advised Bostick that he could refuse to answer their questions,¹²⁷ the dissent argued that the majority erred because its decision was

¹²⁰ *Id.* at 2388.

¹²¹ *Id.* at 2391-92 (Marshall, J., dissenting). Justice Marshall compared the intrusive nature of suspicionless police sweep of buses in intrastate or interstate travel to the general warrant that the Fourth Amendment was originally designed to protect against. *Id.* at 2389 (Marshall J., dissenting). He noted that sweeps are intrusive and inconvenient to passengers, delay departure of the bus, and that the success rate of sweeps is low, e.g., in one case sweeps of 100 buses only resulted in seven arrests. *Id.* at 2390 (Marshall, J., dissenting).

¹²² *Id.* at 2391-92 (Marshall, J., dissenting).

¹²³ *Id.* at 2392 (Marshall, J., dissenting).

¹²⁴ *Id.* (Marshall, J., dissenting). The majority rebutted the dissent's argument that the Florida Supreme Court did not rule *per se* citing a series of cases in which the Florida Supreme Court quashed denials of motion to suppress based on its affirmative answer to the certified question considered in this case. *Id.* at 2385 n.**. See, e.g., *McBride v. State*, 554 So. 2d 1160 (1989); *Mendez v. State*, 554 So. 2d 1161 (1989); *Shaw v. State*, 555 So. 2d 351 (1989); *Avery v. State*, 555 So. 2d 351 (1989); *Serpa v. State*, 555 So. 2d 1210 (1989); *Jones v. State*, 559 So. 2d 1096 (1990).

¹²⁵ *Bostick*, 111 S. Ct. at 2391 (Marshall, J., dissenting).

¹²⁶ *Id.* at 2392-93 (Marshall, J., dissenting).

¹²⁷ *Id.* at 2392 (Marshall, J., dissenting).

based on the officers' asking consent to search Bostick's luggage.¹²⁸ The dissent reasoned that it did not matter that the officers asked for consent to search the luggage because they had already seized Bostick, making his consent unlawful.¹²⁹ "Consequently, the issue is not whether a passenger in respondent's position would have felt free to deny consent to the search of his bag, but whether such a passenger—without being apprised of his rights—would have felt free to terminate the antecedent encounter with the police."¹³⁰

The dissent argued that Bostick would not have felt free to break off the initial encounter with the police, i.e., he would not have felt free to refuse the officers request to see his identification and bus ticket.¹³¹ Since the typical passenger does not know that the police can not use his refusal to cooperate against him, the majority's argument that a passenger's refusal to answer a question does not give rise to seizure becomes a moot point.¹³² Furthermore, the dissent asserted that a passenger cannot be expected to try to squeeze by a "gun-wielding inquisitor," and even if a passenger thought he could get by the officers, he would have been deterred by the possibility of being stranded if he left the bus.¹³³

Although the majority compared *Bostick* to *Delgado*, the dissent asserted that the cases are easily distinguished.¹³⁴ "Unlike passengers confronted by law-enforcement officials on a bus stopped temporarily at an intermediate point in its journey, workers approached by law-enforcement officials at their work need not abandon personal belongings and venture into unfamiliar environs in order to avoid unwanted questioning."¹³⁵ In criticizing the majority's reasoning, the dissent stated that, "a person's 'voluntary decision' to place

¹²⁸ *Id.* at 2392-93 (Marshall, J., dissenting).

¹²⁹ *Id.* at 2393 (Marshall, J., dissenting). Justice Marshall noted that "the State concedes, and as the majority purports to 'accept,' if respondent was unlawfully seized when the officers approached him and initiated questioning, the resulting search was likewise unlawful no matter how well advised respondent was of his right to refuse it." *Id.* (Marshall, J., dissenting) (cites omitted).

The majority refuted the dissent's argument that it based its decision on voluntary consent that was actually compelled by an intimidating show of authority. *Id.* at 2388. The majority stated that its holding did not condone officers boarding buses and using coercive tactics to obtain consent from passengers to conduct a search. *Id.* The consent must be voluntary and not a "product of official intimidation or harassment . . ." *Id.* The majority stated that on remand the Florida courts are to decide "whether Bostick chose to permit the search of his luggage." *Id.*

¹³⁰ *Id.* at 2393 (Marshall, J., dissenting).

¹³¹ *Id.* (Marshall, J., dissenting).

¹³² *Id.* (Marshall, J., dissenting).

¹³³ *Id.* at 2394 (Marshall, J., dissenting).

¹³⁴ *Id.* (Marshall, J., dissenting).

¹³⁵ *Id.* (Marshall, J., dissenting).

himself in a room with only one exit does not authorize the police to force an encounter upon him by placing themselves in front of the exit.”¹³⁶

The dissent noted that “[u]nlike a person approached by the police on the street, or at a bus or airport terminal after reaching his destination, a passenger approached by the police at an intermediate point in a long bus journey cannot simply leave the scene and repair to a safe haven to avoid unwanted probing by law-enforcement officials.”¹³⁷

In conclusion, the dissent said that the “Fourth Amendment clearly condemns the suspicionless, dragnet-style sweep of intra-state or interstate buses.”¹³⁸ The police, however, would remain free to conduct questioning of individuals when there is reasonable suspicion.¹³⁹ Alternatively, suspicionless questioning could be done as long as some guidelines are set, “like advising the passengers confronted of their right to decline to be questioned, to dispel the aura of coercion and intimidation that pervades such encounters.”¹⁴⁰

VI. ANALYSIS

In *Bostick*, the majority stated that the Florida Court erred in “focusing on whether Bostick was ‘free to leave’¹⁴¹ rather than on

¹³⁶ *Id.* (Marshall, J., dissenting).

¹³⁷ *Id.* at 2393 (Marshall, J., dissenting). The majority refuted the dissent’s argument that the majority’s decision would discriminate against those individuals that choose to travel by bus, instead of other modes of transportation. *Id.* at 2388. The majority stated that it was the dissent that wishes to discriminate in favor of bus passengers, because the test to determine whether a reasonable person freely consented “applies equally to police encounters that take place on trains, planes, and city streets.” *Id.*

¹³⁸ *Id.* at 2394 (Marshall, J., dissenting). The majority stated that its decision follows logically from the case law and cites *Terry*, *Royer*, *Rodriguez*, and *Delgado* to dispel the dissent’s concern that officers, without reasonable suspicion, would be asking bus passengers potentially incriminating questions. *Id.* at 2388. The cases the majority referred to all endorsed the proposition that mere questioning by an officer does not require Fourth Amendment scrutiny. See *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984); *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984); *Florida v. Royer*, 460 U.S. 491, 501 (1983) (plurality opinion); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

The majority also realized that constitutional guarantees should not be suspended in order to help the Government wage a “war on drugs.” *Bostick*, 111 S. Ct. at 2389. However, the majority did not agree that these guarantees would be suspended by not allowing the cramped confines of a bus to be the dispositive factor in every case because there are other factors that should be equally considered. *Id.*

¹³⁹ *Bostick*, 111 S. Ct. at 2394 (Marshall, J., dissenting).

¹⁴⁰ *Id.* (Marshall, J., dissenting).

¹⁴¹ See *supra* text accompanying notes 30-67 for a discussion of the “free to leave” standard.

the principle that those words were intended to capture.”¹⁴² The majority concluded that the Florida Supreme Court erred in finding a seizure because its decision was based solely on the fact that the encounter between Bostick and the police took place on a bus, instead of considering the totality of the circumstances.¹⁴³ It is questionable, however, whether the Florida Supreme Court ruled *per se* that all police encounters on a bus constitute a seizure of the person. As the dissent points out, the Florida Supreme Court seemed to base its decision on all of the circumstances in this case, rather than on the sole fact that the encounter took place on a bus.¹⁴⁴ In particular, the Florida Supreme Court stated that “[t]he crucial question is whether, under *all the circumstances*, a reasonable person would have believed he was not free to leave.”¹⁴⁵ Nevertheless, for the purpose of this analysis, this note concedes, *arguendo*, that the Florida court ruled *per se*.

This note concludes that neither the Florida Supreme Court’s *per se* rule nor the majority’s variation of the *Mendenhall-Royer* test is appropriate for determining when an encounter on a bus becomes a seizure. Rather, a better test would consider the objective purpose for which an officer initially approaches an individual. This note agrees that the majority’s rule is consistent with current case law. However, this case law relies on a reasonable person standard that does not represent reality, since the average person would not assert himself when questioned by the police. By suggesting in dictum that the nature of the encounter in this case probably does not constitute a finding of seizure,¹⁴⁶ the majority continues the development of the artificial reasonable person. As a result of the majority’s failure to appreciate the facts or of the majority’s cloaked judicial activism, the *Bostick* decision promotes unbridled police discretion and may result in major social consequences.

A. EVALUATION OF THE MAJORITY’S RULE

1. *The Bostick Rule is Consistent with Current Case Law*

The majority characterizes dragnet styled bus sweeps as consensual encounters involving mere questioning of the passenger by the police, given that there is no intimidating show of authority by the officers.¹⁴⁷ The majority supports its conclusion by formulating

¹⁴² *Bostick*, 111 S. Ct. at 2387.

¹⁴³ *Id.* at 2388.

¹⁴⁴ *Id.* at 2391-92 (Marshall, J., dissenting).

¹⁴⁵ *Bostick v. State*, 554 So. 2d 1153, 1157 (Fla. 1989) (emphasis added).

¹⁴⁶ *Bostick*, 111 S. Ct. at 2388.

¹⁴⁷ *Id.* at 2386, 2388.

a variation of the *Mendenhall-Royer* "free to leave" test, namely, "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."¹⁴⁸ According to Justice O'Connor, "[t]his formulation follows logically from prior cases and breaks no new ground."¹⁴⁹ Indeed, the approach in *Bostick* is consistent with *Chesternut* where the Court expressly refused to adopt a *per se* or "bright line" rule to determine when a seizure occurs in investigative pursuit cases.¹⁵⁰ In particular, the majority's rule continues the traditional contextual approach of considering all of the circumstances, rather than calling all police encounters on a bus a seizure of the person. This also comports with the proposition endorsed in *Royer* that Fourth Amendment rights are not implicated when the police simply pose questions to a willing listener.¹⁵¹

Furthermore, it can properly be inferred from Justice Rehnquist's reasoning in *Delgado* that the term "free to leave" in the *Mendenhall-Royer* test should not be read literally when the person is already restricted from leaving the area by something or someone other than the police.¹⁵² Similar reasoning was also employed in the *Brower* investigative pursuit case. In dicta, Justice Scalia asserted that the restraint on the individual's freedom must be a result of the government's intentionally applied means.¹⁵³ Justice Scalia qualified his statement by noting that it was not practical to look at the specific subjective intent of the officer; hence, one should only look to see whether the means caused a restraint and not whether the means caused the exact type of restraint that the officer intended.¹⁵⁴

Finally, the Court in *Bostick* is simply adjusting the *Mendenhall-Royer* rule so that the wording is applicable to situations other than the typical encounter between an officer and a pedestrian on the street or in a transportation terminal. Similarly, the Court in *Chesternut* made an adjustment for the investigative pursuit cases, namely, whether a reasonable person was "free to disregard the po-

¹⁴⁸ *Id.* at 2387.

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* text accompanying notes 54-58.

¹⁵¹ See *supra* text accompanying notes 41-44.

¹⁵² See *supra* text accompanying notes 52-53.

¹⁵³ *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989).

¹⁵⁴ *Id.* at 598. Justice Scalia explained:

In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.

Id. at 598-99.

lice presence and go about his business.”¹⁵⁵ Accordingly, Justice O'Connor is correct that the rule pronounced in *Bostick* breaks no new ground.

2. *The Foundation Underlying The Bostick Rule is Only a Legal Fiction*

Logically following case law does not necessarily make a rule the right one, especially if the Court has had difficulty applying the original rule from its inception and has on occasion manipulated the rule to achieve a desired outcome. A number of commentators have criticized the *Mendenhall-Royer* test because, contrary to the intent of the test explained in *Chesternut*,¹⁵⁶ the test does not provide objectivity and consistency in determining exactly when a seizure occurs.¹⁵⁷ A primary criticism is that the Court has constructed a highly artificial reasonable person who would assert himself in most police encounters, even though the average citizen would not.¹⁵⁸ Commentators have noted that “in virtually every police-citizen encounter the average citizen does not feel free to walk away.”¹⁵⁹ The application of this artificial reasonable person has resulted in similar cases being decided differently based on “minute factual differences.”¹⁶⁰

A brief comparison of the facts and holdings in *Mendenhall*¹⁶¹ and *Royer*¹⁶² supports this point. The encounter in both cases took place on an airport terminal concourse. In each case more than one officer was involved, and a drug courier profile was used to select the individual for questioning. In addition, in each case when it was discovered that the individual used different names on his or her

¹⁵⁵ *Michigan v. Chesternut*, 486 U.S. 567, 576 (1988).

¹⁵⁶ See *supra* text accompanying notes 58-63.

¹⁵⁷ See Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 440 (1988); Rachel A. Van Cleave, Note, *Michigan v. Chesternut and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?*, 40 HASTINGS L.J. 203, 213 (1988).

¹⁵⁸ Butterfoss, *supra* note 157, at 439-40.

¹⁵⁹ See *id.* at 463; 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE, § 9.2(h), at 410-11 (2d ed. 1987) (“‘Implicit in the introduction of the [officer] and the initial questioning is a show of authority to which the average person encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer.’”); Marjorie E. Murphy, *Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification*, 1986 ARIZ. ST. L.J. 207, 215 (1986) (“Few people ‘will ever feel free not to cooperate fully with the police by answering their questions.’”); see also Emily J. Sack, Note, *Police Approaches and Inquiries on the Streets of New York: The Aftermath of People v. DeBour*, 66 N.Y.U.L. REV. 512, 517 (1991); Van Cleave, *supra* note 157, at 212-14.

¹⁶⁰ Butterfoss, *supra* note 157, at 440; see Van Cleave, *supra* note 157, at 213.

¹⁶¹ See *supra* note 31 and accompanying text for a complete discussion of the facts and holding in *Mendenhall*.

¹⁶² See *supra* text accompanying notes 44-45, and notes 43, 46 and accompanying text for a complete discussion of the facts and holding in *Royer*.

identification and ticket, the officers asked the individual to accompany them to a room for more questioning. At this point, the cases differ slightly: in *Royer* the officers retained his ticket and identification; whereas, in *Mendenhall* the officers returned her ticket and identification before proceeding to the room for further questioning. Another distinction in the cases is the size of the interrogation room. In *Royer* the room was a "large storage closet" with a small desk and a couple chairs. In *Mendenhall* the room was part of a three room office that was connected by a reception area. A majority of the Court in *Royer* concluded on these facts that Royer had been seized.¹⁶³ In contrast, a two person plurality in *Mendenhall* concluded that Mendenhall had not been seized,¹⁶⁴ and three concurring justices found the question of seizure to be an extremely close one.¹⁶⁵

The number and strength of dissents and concurrences in *Mendenhall*¹⁶⁶ and *Royer*¹⁶⁷ further demonstrates how arbitrary the application of the *Mendenhall-Royer* rule can be. For instance, in *Royer*, the plurality found a seizure based on the totality of the circumstances, but seemed to focus primarily on the single fact that the officers retained Royer's license and airline ticket.¹⁶⁸ In separate opinions, the two concurring judges found a seizure of the person at points different from the plurality—Justice Brennan found that a seizure occurred when the officers initially asked Royer for identification;¹⁶⁹ whereas, Justice Powell found that a seizure occurred only after the officers had taken Royer to the room for questioning.¹⁷⁰ There was even disagreement amongst the four dissenting justices. In dissent, Justice Blackmun agreed that a seizure had occurred, but neglected to say at which point during the encounter.¹⁷¹ In contrast, the three other dissenting justices found that no seizure had occurred at any time during the encounter.¹⁷²

Another example of the arbitrariness of the application of the *Mendenhall-Royer* rule is the Court's conclusion in *Chesternut* that driving a patrol car parallel to a running pedestrian is intimidating but

¹⁶³ See *Florida v. Royer*, 460 U.S. 491, 508-09 (1983).

¹⁶⁴ *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (opinion of Stewart, J.).

¹⁶⁵ *Id.* at 560 n.1 (Powell, J. concurring in part and concurring in judgment).

¹⁶⁶ See *supra* note 31 and accompanying text for discussion of the concurrences and dissents in *Mendenhall*.

¹⁶⁷ See *supra* note 46 and accompanying text for discussion of the concurrences and dissents in *Royer*.

¹⁶⁸ See *Florida v. Royer*, 460 U.S. 491, 501-02 (1983).

¹⁶⁹ *Id.* at 511 (Brennan, J., concurring in the result).

¹⁷⁰ *Id.* at 508 (Powell, J., concurring).

¹⁷¹ *Id.* at 516-19 (Blackmun, J., dissenting).

¹⁷² *Id.* at 526 (Rehnquist, J., dissenting).

not in itself a sufficient "show of authority" to constitute a seizure.¹⁷³ The Court indicated that the siren needed to be turned on or some other action needed to be taken by the police before it would conclude that there was a seizure.¹⁷⁴ Nevertheless, the Court ignored the fact that the pedestrian had started to run at the sight of the patrol car and the officers had accelerated to catch up with him, even though the officers had no reasonable suspicion that he was involved in criminal activity.¹⁷⁵ An application of the "free to leave" test at this antecedent event would lead one to conclude that the pedestrian was exercising his right to disregard the police. The Court's analysis in *Chesternut* indicates that isolated facts are more important than the totality of circumstances.

Likewise, in *Delgado*, after determining that the entire factory was not seized, the Court failed to consider the one-on-one encounters with respect to the totality of the circumstances.¹⁷⁶ The surrounding atmosphere was quite coercive, since the surveys involved many agents who displayed badges, carried walkie-talkies and weapons,¹⁷⁷ and chased down those workers who tried to hide.¹⁷⁸ Nevertheless, the majority ignored these facts and focused on the nature of the questioning of the individual worker at his work station. The majority maintained that the worker could always ignore the questions and continue to work.¹⁷⁹ However, how likely is it that a reasonable person in this situation would feel he could disregard the agent's questions and continue to work without suffering some consequences? The majority also suggested that if the worker had attempted to avoid the agents and failed, then there probably would have been a seizure.¹⁸⁰ This assertion by the majority again supports the conclusion that the Court is primarily looking for obvious signs of coercion.

The *Mendenhall-Royer* rule has also been manipulated to make it more difficult to find that a seizure has occurred. In *Hodari*,¹⁸¹ Justice Scalia relegated the "free to leave" test to being only the first of two elements that must be satisfied in order for a police encounter to constitute a seizure.¹⁸² The second element requires that the in-

¹⁷³ *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988).

¹⁷⁴ *Id.*

¹⁷⁵ *See id.* at 569.

¹⁷⁶ *I.N.S. v. Delgado*, 466 U.S. 210, 229-30 (1984) (Brennan, J., dissenting).

¹⁷⁷ *Id.* (Brennan, J., dissenting).

¹⁷⁸ *Id.* at 220.

¹⁷⁹ *Id.* at 220-21.

¹⁸⁰ *Id.*

¹⁸¹ *See supra* text accompanying notes 66-67.

¹⁸² *California v. Hodari D.*, 111 S. Ct 1547, 1550-52 (1991). In determining that the

dividual must have actually submitted to the officer's show of authority.¹⁸³ This second element, however, violates the objectivity that the *Chesternut* Court said the "free to leave" test was supposed to provide, because this element requires the Court to consider the particular individual's response, rather than a reasonable person's response. Moreover, the *Hodari* rule is similar to one of the "bright line" rules that was rejected by a majority of Court in *Chesternut*.¹⁸⁴

B. APPLICATION OF THE RULE IN *BOSTICK*

The *Bostick* dicta amplifies the artificiality of the reasonable person because a person would have to assert himself in a confined space with police officers standing over him. Unlike the workers in *Delgado*, the encounter becomes a forced confrontation that virtually cannot be avoided. The majority's analysis of the totality of the circumstances appears to ignore the coerciveness of the bus environment and to overestimate the assertiveness of the average citizen.

1. *Does Police Conduct Always Have the Same Effect?*

The majority in *Bostick* focuses on the conduct of the officers, rather than the totality of the circumstances. As a result, the majority fails to adhere to the *Chesternut* language when applying the rule. The Court in *Chesternut* stated that not just the conduct of the police but the setting in which the conduct occurs could have a restraining effect.¹⁸⁵

Like the Court in *Delgado*, however, after ruling that a bus environment was only a factor to consider and not dispositive on a seizure determination, the *Bostick* majority conveniently ignored any coercive affect that the environment would have on a person being questioned. Instead, the majority examined the officers' conduct to determine whether the officers had committed overt acts that would constitute a seizure of a person. In dictum, the majority doubted whether a seizure occurred because "the officers did not point guns at Bostick or otherwise threaten him . . ." ¹⁸⁶ This conclusion is not

"free to leave" test is not always dispositive, Justice Scalia focused on the term "only if" in the *Mendenhall-Royer* rule: "A person has been 'seized' within the meaning of the Fourth Amendment *only if*, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 1551 (emphasis added). Justice Scalia concluded that the test "states a necessary, but not a sufficient condition for seizure" because the term "only if" was used rather than the term "whenever." *Id.*

¹⁸³ *Id.* at 1551.

¹⁸⁴ See *supra* note 56 and accompanying text.

¹⁸⁵ *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

¹⁸⁶ *Florida v. Bostick*, 111 S. Ct. 2382, 2388 (1991).

surprising since in reality the overt acts the majority looked for are the same overt acts that would unequivocally constitute a seizure of the person in an airport terminal or on a street.

The majority stated that under *Royer* and its progeny "[t]here is no doubt that if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure."¹⁸⁷ Regardless of the setting, however, it is hard to imagine the "drug raid" jackets worn by the officers and the gun displayed by one of the officers not amounting to an intimidating show of authority that would make a reasonable person feel restrained. Another fact ignored by the majority is that a bus passenger is typically sitting during such an encounter which places him in a subordinate role from the beginning of the encounter; whereas, in the typical airport encounter the individual approached is standing.

Therefore, the *Bostick* majority did not consider the totality of the circumstances.

2. *Do Average People Say No to Police?*

Since the majority doubts that a seizure occurred in this case, it is suggesting that a reasonable person would have felt free to assert himself and could have refused to cooperate with the officers. The majority's reasonable person is assertive because he knows that "a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."¹⁸⁸ The majority can argue, however, that knowledge of this right is irrelevant because "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."¹⁸⁹ The natural sense of duty to cooperate with the police is very helpful in fighting crime.

Nevertheless, the Court is supposed to make sure that the police do not take advantage of this natural sense of duty to cooperate with the police in order to obtain additional information. The assessment of whether the police used coercive tactics is to be done by considering the totality of the circumstances.¹⁹⁰ Since seizure is determined as a matter of law, this assessment does not take into account the maturity and intelligence level of the individual who is

¹⁸⁷ *Id.* at 2386.

¹⁸⁸ *Id.* at 2387.

¹⁸⁹ *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984).

¹⁹⁰ *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

approached by the police.¹⁹¹ In other words, an individual's knowledge and self confidence is not to be considered.

The tendency of the Court, however, to not properly assess the totality of the circumstances makes an individual's lack of knowledge of his rights significant. And as the dissent correctly points out, most people do not know what their rights are.¹⁹² Therefore, under the circumstances in this case, it is significant that the officers did not advise Bostick of his rights before asking for his identification and bus ticket. Up to that point, the officers did nothing to dispel the aura of their authority and by the time they advised Bostick of his right to refuse consent, Bostick was already effectively seized.¹⁹³ There is no reason why the officers could not identify their intentions to look for drugs up front and advise Bostick of his rights before asking for information. The fact that the officers found nothing wrong with Bostick's identification and still asked to search the luggage, implies that the purpose of the identification check is not a pre-screening to determine whose luggage should be checked.

On the contrary, the purpose of the unqualified identification check seems to be more of a show of authority. Unlike the request for proof of citizenship in *Delgado* or in the case of a traffic stop, the request for identification in this case is outside the purpose of the encounter. Justice Brennan, in his concurrence in *Royer*, noted the difference between a police officer simply asking a person on the street questions and a police officer asking a person at an airport terminal to produce his/her airline ticket and driver's license.¹⁹⁴ Justice Brennan stated: "By identifying themselves and asking for Royer's airline ticket and driver's license the officers, as a practical matter, engaged in a "show of authority" and "restrained Royer's liberty."¹⁹⁵

In brief, the majority erred in dismissing the initial encounter between Bostick and the officers as mere questioning. The majority neither considered the totality of the circumstances nor the significance of the officers' not advising Bostick of his rights.

C. POSSIBLE CONSEQUENCES OF THE COURT'S RULING

The majority's decision does not provide proper guidance to the law enforcement officials conducting sweeps of buses. By suggesting in dictum that no seizure had occurred, the majority is con-

¹⁹¹ *In Re J.M.*, 1991 D.C. App. Lexis 244, 16-18.

¹⁹² *Bostick*, 111 S. Ct. at 2393 (Marshall, J., dissenting).

¹⁹³ *Id.* at 2392-93 (Marshall, J., dissenting).

¹⁹⁴ *Florida v. Royer*, 460 U.S. 491, 511 (1983) (Brennan, J., concurring in result).

¹⁹⁵ *Id.* at 511-12 (Brennan, J., concurring in result).

doning unbridled police discretion. Consequently, the poor, students and elderly, who are the primary bus passengers, will continue to be inconvenienced and traumatized by the sweeps. In contrast, it is doubtful that the police will conduct sweeps of first class or business airline passengers.¹⁹⁶

First, the typical dragnet bus sweep delays the bus, because the officers do not depart until the sweep is complete, which frequently takes more time than a stopover of ten or twenty minutes.¹⁹⁷ Second, the passengers may suffer public embarrassment if the search of their luggage reveals something that they would prefer to keep private.¹⁹⁸ Third, there is always the possibility of an armed confrontation, especially if a drug courier finds himself cornered. In such an instance, all passengers are in danger. Furthermore, the nature of the sweeps will proliferate age, gender, ethnic and racial discrimination. Officers admit that, during routine bus sweeps, people are sometimes selected based on gender, age and race.¹⁹⁹

Finally, it is evident that law enforcement does not require the unbridled discretion that the majority gives. Subsequent to the Florida Supreme Court decision,²⁰⁰ the Broward County Sheriff officers performed bus sweeps without a display of weapons and badges, and the officers provided a clear path for the passenger under question to leave.²⁰¹

D. POSSIBLE ALTERNATIVE TO THE *MENDENHALL-ROYER* TEST

Justice O'Connor criticized the dissent for advocating the overruling of more than twenty years of precedent starting with *Terry*.²⁰² This is an incorrect assertion, however, because Justice Marshall's position would limit only the last eleven years of precedent starting with *Mendenhall* where the reasonable person was introduced. The *Terry* Court made no mention of such a person in its dicta. Hence, until a better universal test is developed, the *Mendenhall-Royer* test

¹⁹⁶ Motion to File Brief and Brief Amicus Curiae of Americans for Effective Law Enforcement, Inc., In Qualified Support of Affirmance of the Decision Below at 8, Florida v. Bostick, 111 S. Ct. 2382 (1991) (No. 89-1717).

¹⁹⁷ *Bostick*, 111 S. Ct. at 2390 (Marshall, J., dissenting).

¹⁹⁸ See Brief Amicus Curiae of the American Civil Liberties Union . . . In Support of Respondents at 6, Florida v. Bostick, 111 S. Ct. 2382 (1991) (No. 89-1717).

¹⁹⁹ *Bostick*, 111 S. Ct. at 2390 n.1 (Marshall, J., dissenting).

²⁰⁰ See *supra* text accompany notes 83-93 for a detailed discussion of the Florida Supreme Court decision.

²⁰¹ See Brief of Respondent, *supra* note 70, at 21 n.21; See also *United States v. Hammock*, 860 F.2d 390, 391-92 (11th Cir. 1988) (the court held that a seizure had not occurred, since officers concealed their weapons and stood slightly behind the passenger in order to keep the aisle clear).

²⁰² *Bostick*, 111 S. Ct. at 2388.

should be limited to the original pedestrian setting from which it was conceived where the natural environment is not as coercive.²⁰³

This Note suggests that, at least with respect to bus encounters, the Court adopt an approach suggested by Professor Butterfoss. Professor Butterfoss set out a two-test standard that combines a "free to leave" test with the *Terry* balancing test. Under this approach, the *Mendenhall-Royer* test is limited to police encounters where the police approach a person to seek his cooperation on matters other than an individual's involvement in criminal activity.²⁰⁴ On the other hand, the *Terry* balancing test would be used when the officer approaches an individual with the purpose of questioning him about his involvement in criminal activity.²⁰⁵ Professor Butterfoss calls this approach the "purpose of the stop" test.²⁰⁶

1. The "Purpose of the Stop" Test

The "purpose of the stop" test draws a "bright line" for determining when a seizure of the person has occurred. Such a rule looks at the officer's objective intent. If his objective intent is to investigate a particular individual's involvement in criminal activity, then he needs reasonable suspicion to do so. For instance, if the officer's specific assignment is to look for drug couriers on buses, he would

²⁰³ A pedestrian typically has freedom of movement and in most cases would be familiar with the surroundings.

²⁰⁴ Butterfoss, *supra* note 157, at 470. Professor Butterfoss explained:

When a police officer approaches a citizen and asks questions as part of the officer's "community caretaking function," to seek the citizen's cooperation, or for reasons other than suspicion that the citizen is involved in a crime, the Fourth Amendment will not be implicated until a seizure occurs as defined by either the *Mendenhall-Royer* standard or some other standard based on what actions are appropriate in such a situation.

Id.

²⁰⁵ *Id.* Professor Butterfoss explained that "if the officer suspects the individual approached of involvement in criminal activity, the Fourth Amendment will be implicated immediately. Such a two-test scenario is both practical and logical." *Id.*

²⁰⁶ Professor Butterfoss further explained:

The two-test scenario is practical in part because the issue of whether a police-citizen encounter with a non-suspect constitutes a seizure will not arise frequently. As Professor LaFave points out, if the person stopped is merely a potential witness, it is unlikely that the person "will have the occasion or desire to challenge this action unless something incriminating that person occurs as a consequence of the stop. . . ."

The distinction between the two types of cases is also logical. A test based on the purpose of the police in initiating an encounter recognizes the wholly different character of police-suspect encounters, resulting in large part from the self-incrimination implications of those encounters. Moreover, it provides more consistent results and strikes a more appropriate balance between Fourth Amendment protections and the need to fight crime.

Id. at 470-71 (footnotes omitted).

need reasonable suspicion to interview passengers regarding their involvement in drug trafficking.

"Such a standard recognizes the important distinction between the different types of police-citizen encounters, more properly balances the competing interests of the individual and the state, and provides a more workable standard."²⁰⁷ In contrast, *Mendenhall-Royer* treats "identically individuals whom police approach for the purpose of discovering whether that individual is involved in criminal activity and individuals to whom police desire to speak for other, innocuous reasons."²⁰⁸ *Mendenhall-Royer* as a universal test is unsatisfactory, however, because it fails to consider a person's Fifth Amendment²⁰⁹ rights which are implicated when the officer is investigating to determine whether that person is involved in criminal activity.²¹⁰ Using the artificial reasonable person standard that the *Mendenhall-Royer* is based on, the Court may take advantage of self-incriminating evidence obtained through the inherent coerciveness of a police-citizen encounter.²¹¹

2. Application of the "Purpose of the Stop" Test to Bus Encounters

In the typical bus sweep, the police are not boarding the buses to interview witnesses to a crime. Instead, they are conducting a criminal investigation of each passenger. The objective intent of the officers is to look for drug trafficking. In this limited case, the officers would know going in that they need reasonable suspicion or alternatively would need to advise people of their rights. Applying this test to bus encounters will not severely hamper law enforcement efforts to fight the "drug war," because there are alternatives available that can be more easily justified, under the *Terry* balancing test.

Police have no need to enter the bus to stop drug trafficking when they are not looking for a particular person whom they know is carrying drugs. The officers could stand outside the bus as the passengers board and have a drug detection dog sniff the luggage as

²⁰⁷ *Id.* at 474.

²⁰⁸ *Id.* at 472 (footnote omitted).

²⁰⁹ The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

²¹⁰ Butterfoss, *supra* note 157, at 468.

²¹¹ *Id.* at 472.

passengers walk by. Since drug couriers typically carry guns, the use of metal detectors would reduce the possibility of violence and may inconvenience the courier enough that he would choose not to travel by bus. Finally, x-ray devices similar to those used in airports could be used to screen carry-on baggage while the passenger is still in the bus terminal. All these methods are like a road block set up to control drunk driving or a border check point set up to control illegal immigration.²¹² Both of these situations have passed the *Terry* balancing test. Although the methods may be intrusive, they do not discriminate and they allow an individual an opportunity to avoid the encounter.

3. *Implementation of the Approach*

Since the Supreme Court seems unwilling to pronounce a rule that can be easily and consistently applied, Professor Butterfoss and other commentators have concluded that the best alternative is to leave the selection or development of the appropriate test to the state courts.²¹³ Unfortunately, this is not a viable option for the Supreme Court of Florida because the relevant Florida constitutional provision provides in part:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communication by any means, shall not be violated. . . . *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.* . . .²¹⁴

Similarly, the Court of Appeals for the District of Columbia, another city where dragnet styled bus sweeps are conducted, is restrained from interpreting the Fourth Amendment contrary to the United States Supreme Court. The District must follow the Supreme Court because it has no constitution of its own and its court of appeals has no authority to rule otherwise.²¹⁵ Thus, without new legislation, in these jurisdictions the United States Supreme Court will decide how much protection individuals will have against unwarranted intrusions.

²¹² See, e.g., *Martinez-Fuerte v. United States*, 428 U.S. 543 (1976).

²¹³ Butterfoss, *supra* note 157, at 482.

²¹⁴ FLA. CONST. art. I, § 12 (emphasis added).

²¹⁵ "The Supreme Court held in *Bostick* that the particular interdiction device [bus sweep] which the police utilized in this case is not unconstitutional *per se*, and we are bound to accept, and to follow fairly rather than grudgingly, its clear (but quite narrow) decision." *In Re J.M.*, 1991 D.C. App. Lexis 244, 48.

VII. CONCLUSION

The decision in *Florida v. Bostick* furthers the development of a seizure test that incorporates a reasonable person standard that does not represent reality. In particular, the majority failed to appreciate the totality of the circumstances and overestimated the assertiveness of the average person. As a result, law enforcement officials are free to act in a coercive manner as long as they do not commit blatant acts of intimidation. Such discretion, however, is more than what is necessary to investigate drug trafficking on interstate and intrastate buses, and also fails to consider the Fifth Amendment rights of a person who is questioned without reasonable suspicion.

Professor Butterfoss' "purpose of the stop" test is the more appropriate test for police encounters on buses. Since in drug interdiction programs the officer's objective intent is easily ascertained, the "purpose of the stop test" can be easily applied. If the officers lack reasonable suspicion, then they would be prohibited from approaching an individual to ask him or her questions about his or her personal involvement in drug trafficking, or to request to search his or her luggage. As an alternative, they could set up check points in the bus terminal or outside of the bus.

Until a test similar to Professor Butterfoss' is adopted, the interstate and intrastate bus passenger's Fourth Amendment rights will continue to be violated. In view of the current direction of the United States Supreme Court, Florida's best recourse is new state legislation that would allow its own Supreme Court to develop a seizure rule.

SHAWN V. LEWIS